Hong Leong Leasing Sdn Bhd v Tan Kim Cheong

HIGH COURT (KUALA LUMPUR) — SUIT NO C5504–85
VISU SINNADURAI J
8 DECEMBER 1993

Contract *— Void contract — Subject matter of contract non-existent — Total failure of consideration — Whether financier can still claim unpaid instalments from hirer*

Hire Purchase *— Breach of agreement — Action to recover unpaid instalments — Non-existence of goods — Whether hirer estopped from raising issue of non-existence of goods — Circumstances where estoppel would arise*

Hire Purchase *— Breach of agreement — Action to recover unpaid instalments — Hirer signed delivery receipt — Whether sufficient to raise estoppel against hirer*

Hire Purchase *— Breach of agreement — Failure to pay instalments — Whether hirer represented to financier that goods were in existence by paying some instalments — Whether plaintiff acted upon representation*

Contract *— Rescission — Hire purchase contract — Hirer paid instalments on hire purchase contract — Whether that would preclude him from bringing contract to an end*

Hire Purchase *— Breach of agreement — Transaction involved financier, dealer and hirer — Whether hirer owed duty of care to financier — Whether there was estoppel by negligence in signing delivery receipt*

The defendant purchased certain machines from a Singaporean company ('the dealer') and pursuant to an agreement, the dealer requested the plaintiff to provide hire purchase facilities to the defendant. In accordance with the agreement, the dealer, having concluded the sale of the machines to the defendant, forwarded the relevant documents, including the hire purchase agreement and delivery receipt to the plaintiff, both duly signed by the defendant. Neither at the time the agreement was entered into, nor at any subsequent time, were the machines in existence. On 25 April 1983, the plaintiff and the defendant entered into a hire purchase agreement, whereby the defendant was bound to pay 23 monthly rentals of about RM11,000 per month. On 13 November 1984, the plaintiff issued to the defendant a notice of intention to repossess the machines. An authority to repossess was also issued to the dealer. Subsequently, the plaintiff issued a notice of termination of the hire purchase agreement. The plaintiff alleged that the defendant had paid 14 instalments and thereafter had defaulted in payment.

The plaintiff, whilst admitting that the machines did not exist, claimed that it was entitled to receive the arrears under the hire purchase agreement on the ground that the defendant was estopped

from pleading the non-existence of the machines. The plaintiff further submitted that by the defendant's conduct, particularly the signing of the delivery receipt and the payment of some instalments, the defendant was estopped from asserting the non-existence of the goods. The defendant however contended that since no machines were received by him, he was under no obligation to pay any of the instalments and also denied having paid any of the instalments. The defendant said that if the plaintiff had received any instalments on his behalf, the same must have been made by the dealer or had been received in connection with another hire purchase agreement between the plaintiff and defendant for some other machines. The defendant alleged that he complained to the dealer when he did not receive the machines and when the plaintiff demanded payment of the instalments. The dealer had promised the defendant that the dealer itself would settle these instalments. The defendant also said that he had informed the plaintiff in writing that he had not received the machines.

The following issues arose for determination: (a) the effect of the non-existence of the goods on the hire purchase agreement; and (b) whether by signing the delivery receipt and by allegedly paying several instalments under the hire purchase agreement, the defendant was estopped from raising the non-existence of the goods as a defence.

Held, dismissing the plaintiff's action:

(1) It is trite law that where the subject matter of the contract is non-existent, there is a total failure of consideration and as such the contract is void. Once there is a total failure of consideration, the financier cannot claim any sum by way of instalments from the hirer. If the hirer had already paid certain sums by way of deposit or as instalments, the financier cannot retain such sums and the parties may seek restitutionary remedies. Here, neither party had made any such restitutionary claim.

(2) In the law of hire purchase, it is sometimes said that the hirer may be estopped from raising the issue of the non-existence of the goods if the hirer had represented to the financier that he already had possession of the goods. If the financier acts on this representation, and to his detriment, the hirer may not subsequently be permitted to plead the non-existence of the goods as a ground to relieve him of his obligations under the hire purchase agreement. However, for estoppel to arise in such circumstances, the statement made by the hirer that the goods had been delivered to him must be: (i) clear and unambiguous; (ii) intended by him to be acted upon by the financier; and (iii) believed by the financier to be true and in fact acted upon by him.

(3) The mere fact that the hirer had signed the delivery receipt, with no intention on his part whatsoever to make any representation to the financier, and with no evidence that the financier acted upon the representation, is insufficient to raise an estoppel against the

hirer. The court was not saying that the signing of a delivered script had no legal consequences in every case but that the signing of the delivery receipt alone certainly could not form the whole basis for raising estoppel against the hirer. In the present case, the so-called delivery receipt was not even in a proper form. It was obvious that it was in a form of a informal note prepared by the dealer and which the defendant was merely asked to sign. It appears to lack the authenticity which delivery receipts should bear.

(4) The plaintiff had also admitted that it was a standard practice for it to have one of its own representatives to inspect the goods when they had been delivered to the hirer before any payment was made to the dealer. In this case, the plaintiff, through its own omission, had failed to do so. The plaintiff, therefore, could not now attempt to blame the defendant for its omission.

(5) In the present case, without having to make a finding as to whether the defendant actually paid any or all of the 14 instalments, the plaintiff had failed to show how by the payment of the instalments, the defendant had intended to make any representation to the plaintiff that the goods were in existence, and even if there was such a representation, how the plaintiff had acted on the representation to its detriment. The defendant, as hirer, may well have paid the instalments in the belief that the machines would be delivered to him shortly. There is no evidence here that by the defendant making these payments, he had represented to the plaintiff the existence of a fact.

(6) Even considering the defendant's combined conduct in signing the delivery receipt and payment of the instalments, estoppel cannot be raised, as the plaintiff has failed to establish that the plaintiff acted upon either or both of these conduct of the defendant to its detriment.

(7) Even if the defendant had intended to maintain the contract by paying the instalments in anticipation that the machines would be delivered to him, the payment of these instalments could not preclude him from thereafter bringing the contract to an end. In any case, it was doubtful whether such principles were at all applicable to cases such as the present one where there was a total failure of consideration. The question of acceptance of the contract only arises in cases where a party seeks to recover money in pursuance of a contract under which he becomes entitled to rescind it on the ground of total failure of consideration. In other words, it was the defendant and not the plaintiff, who had the right to recover the money paid as instalments and the right to affirm or rescind the contract.

(8) Considering the nature of the transaction in the present case, a hire purchase agreement involving a financier, a dealer and a hirer, it appears that the hirer owed the financier no duty of care

as suggested by the plaintiff. The hirer only dealt with the dealer with regard to the details of the transaction and did not deal directly with the financier. It was only the dealer who did so. Therefore, if any such duty was owed at all, it was owed to the plaintiff by the dealer and not by the hirer. Even if the defendant was careless in signing the delivery receipt, the signing of the delivery receipt did not amount to any representation by the defendant to the plaintiff. The question of estoppel by negligence does not arise in the present case. It was clear from the evidence that the defendant did not sign the delivery order merely to mislead the plaintiff; nor was it the real cause of the plaintiff paying the dealer. There was no evidence to show that the plaintiff acted on the conduct of the defendant. The plea of estoppel by representation or negligence failed in limine.

[Bahasa Malaysia summary

Defendan telah membeli mesin-mesin tertentu daripada sebuah syarikat Singapura ('peniaga itu') dan menurut suatu perjanjian, peniaga itu telah meminta supaya plaintif memberi kemudahan sewabeli kepada defendan. Menurut perjanjian itu, peniaga itu, setelah menyempurnakan pembelian mesin-mesin kepada defendan itu, telah memberikan dokumen yang relevan, termasuk perjanjian sewabeli dan resit penghantaran, yang kedua-duanya telah ditandatangani oleh defendan, kepada plaintif. Pada masa perjanjian itu diikat mahupun pada bila-bila masa selepas itu, mesin itu tidak wujud. Pada 25 April 1983, plaintif dan defendan telah mengikat suatu perjanjian sewabeli, di mana defendan disyaratkan supaya membayar 23 sewa bulanan sebanyak lebih kurang RM11,000 sebulan. Pada 13 November 1984, plaintif telah mengeluarkan suatu notis niat untuk mengambil balik milik mesin-mesin itu terhadap defendan. Suatu autoriti untuk mengambil balik milik juga telah dikeluarkan terhadap peniaga. Selepas itu, plaintif telah mengeluarkan suatu notis menamatkan perjanjian sewabeli itu. Plaintif mendakwa bahawa defendan telah membayar 14 ansuran dan selepas itu telah ingkar dalam pembayaran ansuran seterusnya.

Plaintif, sementara mengakui bahawa mesin-mesin itu tidak wujud, telah menuntut bahawa ia berhak untuk menerima tunggakan di bawah perjanjian sewabeli itu atas alasan bahawa defendan diestopkan daripada menyatakan bahawa mesin-mesin itu tidak wujud. Plaintif juga berhujah bahawa melalui kelakuan defendan, terutamanya apabila menandatangani resit penghantaran dan dengan membayar beberapa ansuran, defendan telah diestopkan daripada mendakwa ketidakwujudan barang-barang itu. Akan tetapi, defendan menyatakan bahawa oleh kerana mesin-mesin tersebut tidak diterima olehnya, beliau tidak berobligasi untuk membayar sebarang ansuran. Defendan juga menafikan bahawa beliau telah membayar sebarang ansuran.

Defendan menyatakan bahawa sekiranya plaintif telah menerima sebarang ansuran bagi pihaknya, ia semestinya telah dibayar oleh peniaga atau telah diterima berhubung dengan suatu perjanjian sewabeli yang lain di antara plaintif dan defendan untuk mesin-mesin yang lain. Defendan menyatakan bahawa beliau telah membuat aduan kepada peniaga apabila beliau tidak menerima mesin-mesin itu dan apabila plaintif menuntut bayaran untuk ansuran itu. Peniaga telah berjanji kepada defendan bahawa peniaga itu sendiri akan membayar ansuran tersebut. Defendan juga telah menyatakan bahawa beliau telah memberitahu plaintif secara bertulis bahawa beliau tidak menerima mesin-mesin itu.

Isu-isu berikut timbul untuk dipertimbangkan: (a) kesan ketidakwujudan barang-barang itu terhadap perjanjian sewabeli itu; dan (b) sama ada dengan menandatangani resit penghantaran dan dengan dikatakan membayar beberapa ansuran di bawah perjanjian jualbeli, defendan telah diestop daripada menimbulkan ketidakwujudan barang-barang itu sebagai suatu pembelaan.

Diputuskan, menolak tindakan plaintif:

(1) Adalah menjadi undang-undang mantap bahawa di mana subjek perkara suatu kontrak tidak wujud, terdapatlah suatu kegagalan balasan yang menyeluruh dan dengan itu kontrak itu adalah batal. Di mana terdapat suatu kegagalan balasan yang menyeluruh, pembiaya tidak boleh menuntut sebarang wang ansuran daripada penyewa. Sekiranya penyewa telah membayar beberapa jumlah wang secara deposit ataupun secara ansuran, pembiaya tidak boleh menyimpan wang tersebut dan kedua-dua pihak boleh berusaha memperolehi remedi restitusionari. Di sini, kedua-dua pihak tidakpun membuat tuntutan restitusionari yang sedemikian.

(2) Dalam undang-undang sewabeli, kadang-kadang dikatakan bahawa penyewa mungkin diestopkan daripada membangkitkan isu mengenai ketidakwujudan barang-barang jika penyewa telah membuat representasi kepada pembiaya bahawa beliau telahpun mengambil milik barang-barang itu. Jika pembiaya bertindak atas representasi itu, dan kepada detrimennya, penyewa mungkin tidak dibenarkan untuk menggunakan ketidakwujudan barang-barang itu sebagai suatu alasan untuk membebaskannya daripada obligasi beliau di bawah perjanjian sewabeli itu. Akan tetapi, untuk membangkitkan estopel dalam keadaan sedemikian, penyataan yang dibuat oleh penyewa bahawa barang-barang itu telah dihantar kepadanya mestilah: (i) jelas dan tidak taksa; dan (ii) dimaksudkan olehnya supaya pembiaya bertindak ke atasnya; dan (iii) dipercayai oleh pembiaya sebagai benar dan oleh itu beliau bertindak ke atasnya.

(3) Hakikat bahawa seseorang penyewa telah menandatangani resit penghantaran, tanpa berniat sama sekali untuk membuat sebarang

representasi kepada pembiaya, dan tanpa bukti bahawa pembiaya telah bertindak ke atas representasi itu, adalah tidak mencukupi untuk membangkitkan suatu estopel terhadap penyewa itu. Mahkamah bukan menyatakan bahawa resit penghantaran yang ditandatangani itu tidak mempunyai sebarang kesan undang-undang di dalam setiap kes tetapi bahawa dengan menandatangani resit penghantaran sahaja, dengan pasti tidak boleh membentukkan dasar menyeluruh untuk membangkitkan estopel terhadap penyewa. Di dalam kes ini, resit penghantaran yang dikatakan itu tidak berada dalam bentuk yang betul. Adalah jelas sekali bahawa ia berada dalam bentuk nota tidak rasmi yang telah disediakan oleh peniaga dan yang mana defendan hanya diminta menandatanganinya. Ia nampaknya kekurangan keesahan yang patut ada pada resit nota penghantaran.

(4) Plaintif juga telah mengakui bahawa adalah merupakan amalan biasa untuk menyuruh salah seorang daripada wakilnya untuk memeriksa barang-barang itu apabila ianya dihantarkan kepada penyewa sebelum sebarang bayaran dibuat kepada peniaga. Dalam kes ini, plaintif, melalui peninggalannya sendirinya telah gagal berbuat demikian. Oleh itu, plaintif sekarang tidak boleh cuba menyalahi defendan untuk peninggalannya itu.

(5) Di dalam kes ini, tanpa perlu membuat sebarang kesimpulan mengenai sama ada defendan sebenarnya telah membayar mana-mana ataupun kesemua ansuran itu, plaintif telah gagal untuk menunjukkan bagaimana dengan membuat bayaran ansuran, defendan telah berniat untuk membuat sebarang representasi kepada plaintif bahawa bartang-barang itu wujud, dan jika terdapat representasi sedemikianpun, bagaimana plaintif telah bertindak ke atas representasi itu kepada kemudaratannya. Defendan, sebagai penyewa, mungkin telah membayar ansuran itu dalam kepercayaan bahawa mesin-mesin itu akan dihantarkan kepada beliau dalam masa yang singkat. Tidak ada sebarang bukti di sini yang menunjukkan bahawa dengan membuat pembayaran sedemikian, defendan telah membuat representasi kepada plaintif mengenai kewujudan fakta itu.

(6) Walaupun dengan menimbangkan penggabungan tindakan defendan menandatangani resit penghantaran dan membuat bayaran ansuran itu, estopel tidak boleh dibangkitkan, kerana plaintif telah gagal menunjukkan bahawa plaintif telah bertindak ke atas salah satu atau ke atas kedua-dua tindakan itu kepada kemudaratannya.

(7) Walaupun defendan bertujuan untuk mengekalkan kontrak itu dengan membayar ansuran dengan harapan bahawa mesin-mesin itu akan dihantarkan kepada beliau, bayaran ansuran itu tidak boleh menghalang beliau daripada menamatkan kontrak ini. Walau bagaimanapun, adalah diragui sama ada prinsip-prinsip sedemikian

boleh terpakai sama sekali dalam kes-kes seperti ini di mana terdapat suatu kegagalan balasan yang menyeluruh. Soal penerimaan kontrak hanya boleh berbangkit dalam kes-kes di mana suatu pihak berusaha menuntut wang di bawah suatu kontrak di mana beliau berhak untuk membatalkan kontrak itu atas alasan bahawa terdapat suatu kegagalan balasan yang menyeluruh. Dalam perkataan lain, adalah defendan, dan bukan plaintif, yang berhak mendapat balik wang yang telah dibayar sebagai ansuran dan untuk mengesahkan atau membatalkan kontrak itu.

(8) Dengan mempertimbangkan jenis transaksi di dalam kes ini, iaitu suatu perjanjian sewabeli yang melibatkan seorang pembiaya, peniaga dan penyewa, adalah nyata bahawa penyewa tidak mempunyai tanggungjawab berjaga-jaga terhadap pembiaya sepertimana yang dinyatakan oleh plaintif. Penyewa hanya berurusan dengan peniaga berhubung dengan butir-butir transaksi dan tidak berurus secara terus dengan pembiaya. Hanya peniaga yang berbuat demikian. Oleh itu, jika terdapat sebarang tanggungjawab sedemikian, ianya merupakan tanggungjawab peniaga dan bukannya tanggungjawab penyewa kepada plaintif. Walaupun defendan cuai semasa menandatangani resit penghantaran itu, dengan menandatangani resit penghantaran itu tidak melambangkan bahawa defendan membuat representasi kepada plaintif. Soalan mengenai estopel secara kecuaian tidak berbangkit dalam kes sedemikian. Adalah jelas daripada keterangan bahawa defendan tidak menandatangani nota penghantaran untuk mengelirukan plaintif; dan juga bukan merupakan kausa sebenar mengapa plaintif membayar peniaga itu. Tidak ada bukti yang menunjukkan bahawa plaintif telah bertindak atas kelakuan defendan. Pengataan estopel secara representasi atau kecuaian gagal secara in limine.]

Notes

For a case on rescission of contracts, see 3 *Mallal's Digest* (4th Ed) para 1423.

For a case of an action to recover unpaid instalments, see 7 *Mallal's Digest* (4th Ed) para 1857.

For cases on default or failure in payment of instalments, see 7 *Mallal's Digest* (4th Ed) paras 1867–1873.

Cases referred to

1 *Swee Bee Trading Co Pte Ltd v Lanho Corp (Pte) Ltd* [1983] 2 MLJ 89 (distd)

2 *Lowe v Lombank Ltd* [1960] 1 All ER 611; [1960] 1 WLR 196 (refd)

3 *Yeoman Credit Ltd v Apps* [1962] 2 QB 508; [1961] 2 All ER 281 (distd)

4 *Karsales (Harrow) Ltd v Wallis* [1956] 2 All ER 866; [1956] 1 WLR 936 (refd)
5 *Moorgate Mercantile Co v Twitchings* [1975] 3 All ER 314 (CA); [1976] 2 All ER 641 (HL) (refd)
6 *Seton, Laing & Co v Lafone* (1887) 19 QBD 68 (refd)
7 *Amalgamated Investment & Property Co v Texas Commerce International Bank* [1982] QB 84; [1981] 3 All ER 577 (refd)
8 *Walton Stores (Interstate) Ltd v Maher* (1988) 62 ALJR 110; (1988) 164 CLR 387 (refd)

Chong Wei Lung (*WY Chan & Roy*) for the plaintiff.
MS Murthi (*Murthi & Partners*) for the defendant.

Visu Sinnadurai J: The plaintiff's claim against the defendant is for breach of contract. The plaintiff is claiming a sum of money said to be due to the plaintiff under a hire purchase agreement. That the defendant entered into an hire purchase agreement for the hire of two machines (two units of reconditioned P & H Crawler Piling machines), is not disputed. What, however, is disputed is the validity of the agreement. Unlike other cases of hire purchase, in this particular instance, the subject matter of the agreement, that is, the machines, never existed. The fact that there were no machines in existence at the time the agreement was entered into, nor at any time subsequent to that, is not contested by either of the parties. As such, the trial proceeded on the agreed fact that no such machines were ever in existence.

Another unusual feature of this case relates to the doctrine of estoppel. Again unlike most other cases where estoppel is invoked against a party bringing an action, in the present case, estoppel is raised by the plaintiff to defeat a possible defence of the defendant. In other words, estoppel is used in the present case not *against* a plaintiff, but *by* a plaintiff. I shall elaborate on this point in the later part of my judgment.

The facts

The facts of the present case giving rise to the hire purchase agreement is similar to a typical arrangement whereby three parties are involved: the hirer (the defendant); the financier (the plaintiff); and the dealer (not a party to the present proceedings). Like most other hire purchase agreements for the hire of equipment, the hirer negotiated with the dealer, Sin Nam Huat (Heavy Equipment) Pte Ltd, a company incorporated in Singapore, for the acquisition of two machines and for credit facilities. The defendant paid a deposit of RM60,000 and signed the necessary documents as required by the dealer.

Pursuant to a master recourse agreement (P1), entered into between the plaintiff, as the financier and Sin Nam Huat, as the dealer, the dealer requested the plaintiff to provide hire purchase facilities to the defendant. In accordance with this agreement, the dealer, having concluded the sale of

the machines to the hirer, forwarded the relevant documents, including the hire purchase agreement and the delivery receipt to the plaintiff, both duly signed by the defendant. The plaintiff accepted the dealer's request and agreed to provide the required hire purchase facilities to the defendant.

On 25 April 1983, the plaintiff, as the owner of the machines, and the defendant, as hirer, entered into an hire purchase agreement (P7). The said hire purchase agreement incorporated the usual terms, inter alia, that the hirer shall pay the rentals (instalments) regularly and that if the hirer defaulted in its payments, the plaintiff, as owner, was entitled to immediate possession of the machines and may terminate the agreement. Under the hire purchase agreement, the defendant, as hirer, was bound to pay 23 monthly rentals of about RM11,000 on the tenth day of each month.

On 13 November 1984, the plaintiff issued to the defendant a notice of intention to repossess the machines. An authority to repossess was also issued to the dealer. Subsequently, the plaintiff issued a notice of termination of the hire purchase agreement. The plaintiff alleged that at the time when the notice of intention to repossess was issued, the defendant had already paid 14 instalments. It was only when he defaulted in the payment of the subsequent instalments which then became due, did the plaintiff take this course of action.

The plaintiff's claim

The plaintiff, whilst admitting that the machines were not in existence, claims that it is entitled to receive the said sum (the arrears) under the hire purchase agreement on the ground that the defendant is estopped from pleading the non-existence of the machines. The plaintiff submits that by the defendant's conduct, particularly the signing of the delivery order (delivery receipt) and the payment by the defendant of some of the instalments due under the hire purchase agreement, the defendant is estopped from asserting the non-existence of the goods. For this purpose, the plaintiff strongly relies on the Singapore Court of Appeal decision of *Swee Bee Trading Co Pte Ltd v Lanho Corp (Pte) Ltd.*[1]

The defendant's case

The defendant's main argument is that since no machines were ever received by him, he was under no obligation to pay any of the instalments. The defendant denied that he had ever paid any of the instalments under the said hire purchase agreement to the plaintiff. He said that if the plaintiff had received any instalments on his behalf, such payments must have been made by the dealer, or that some of these payments which the plaintiff had received were in connection with another hire purchase agreement which the defendant had entered into with the plaintiff for the hire of some other machines. In this regard, he admitted that some of the cheques received by the plaintiff, though made payable to the plaintiff, were paid through the dealer, being instalments for the other hire purchase agreement.

The defendant further alleged that when he did not receive the machines, and when the plaintiff demanded payment of the instalments, he called the dealer to complain about it. The dealer then promised the defendant that the dealer itself will settle these instalments which were then due. He also said that he had written to the plaintiff to inform him that he had not received the machines.

The defence, in its written submission also raised a number of other issues, which for reasons to be stated hereafter, are not relevant for the determination of this case.

The issues

As pointed out earlier, the plaintiff's main contention is that, though the machines were not in existence, the fact that the defendant had signed the delivery receipt acknowledging the receipt of the machines, together with the fact that he had paid a number of instalments, estopped him from now pleading the non-existence of the goods. In other words, the plaintiff, to succeed in its claim against the defendant, must show that the defendant is now estopped from raising the issue of the non-existence of the machines. Such being the case, the following issues arise for determination:

(a) the effect of the non-existence of the goods on the hire purchase agreement; and
(b) whether the signing of the delivery order, acknowledging the receipt of the goods (the delivery receipt) by the defendant, together with the alleged payment of several instalments under the hire purchase agreement, the defendant is now estopped from raising the non-existence of the goods as a defence.

The trial

This is one of those cases which has taken a number of years to be disposed of. Though the action was filed in 1985, the trial, for various reasons, especially the change in counsel for both parties, and various amendments to the pleadings, did not commence until July 1993.

Before the commencement of the trial, counsel for both parties agreed that the trial will be conducted on the agreed fact that the machines never existed. The plaintiff's counsel pointed out that he will limit the evidence to establish that there was a representation made by the defendant by signing the delivery order, and thus establish that there was estoppel. The plaintiff's counsel also pointed out that he will abandon the plaintiff's action on misrepresentation and conspiracy. The defendant's counsel in turn agreed that he will be withdrawing the counterclaim.

The trial was over a period of two days. The plaintiff called two witnesses, and the defendant, only one, himself. The plaintiff's first witness was Mr Francis Chan, who was then the general manager of Hong Leong Finance (Business Division). He gave some evidence regarding the hire purchase transaction in question. In cross-examination, he also admitted

A that in this particular case, though the dealer did not comply with some of the requirements as spelt out in the master resource agreement, the plaintiff paid the dealer. He also said that his company has had numerous other transactions with the defendant and had never confronted any problems with the defendant. He described all these earlier dealings with the defendant as being 'impeachable'. As regards the details of the alleged payment of the earlier instalments by the defendant, Mr Chan was unable to give any firm answer as he said he could not remember. In re-examination, Mr Chan said that in practice, there is no strict compliance with the master recourse agreement — so long as the company felt that the relevant documents were in place.

C The plaintiff's second witness was Ms Veronica Yong, who is currently a loan recovery executive at the plaintiff's company. She had no personal knowledge of the transaction between the plaintiff and the defendant as she was then not in the plaintiff's employ. She merely tendered the statement of the defendant's account with the plaintiff and was unable to confirm as D to the source of the payments which were made into the defendant's account.

During the trial, the defendant applied to amend the defence to deny the payment of any instalments by the defendant. The defendant's application was allowed by the court, and as a consequence, the plaintiff's counsel conceded that the fifth to the tenth instalments were made by way of a set-E off from the account of the dealer, and that it was not paid directly by the defendant.

The defendant was the only witness for the defence. He narrated the circumstances under which the present transaction was entered into. He said that he had prior dealings with the plaintiff and the dealer on numerous F other occasions for similar transactions. He clearly stated that the dealer, as in previous occasions, asked him to sign the delivery order together with the hire purchase agreement, so that he (the dealer) may collect the money from the plaintiff.

The defendant said that the two machines which he ordered from the G dealer in Singapore were not in stock and that the dealer had agreed to purchase them for him from Japan. He denied he had paid any instalments to the plaintiff, and explained that in his previous transactions with the plaintiff, payments were only made after the goods were delivered to him. The defendant said that after a couple of months, when he did not receive the machines, he informed the dealer, and subsequently, the plaintiff. He H said that if any payments were received by the plaintiff in his account with the plaintiff, it must have been paid by the dealer.

Non-existence of the goods

I It is trite law that where the subject matter of the contract is non-existent, there is a total failure of consideration and as such the contract is void: see generally, *Chitty on Contracts* (26th Ed) at para 2058; 9 *Halsbury's Laws of England* (4th Ed) at para 667 and the Singapore Court of Appeal decision

in *Swee Bee Trading Co Pte Ltd v Lanho Corp (Pte) Ltd.*[1] With particular reference to hire purchase agreements, Prof AG Guest in his book, *The Law of Hire Purchase* (1966) Sweet & Maxwell, states the position of the law succinctly as follows (at para 168):

> If the goods let on hire have, at the time the agreement is executed, ceased to exist, or if they have never been in existence, then the agreement is prima facie void. In any event, there is a total failure of consideration, so that the person letting the goods on hire could not claim to recover, or retain, any sums paid by the hirer in pursuance of the agreement.

Therefore, once there is a total failure of consideration, the financier cannot claim any sum by way of instalments from the hirer. Furthermore, if the hirer had already paid certain sums by way of deposit or as instalments, the financier cannot retain such sum. However, where there has been a total failure of consideration, though the agreement is unenforceable, the parties may seek restitutionary remedies: see Goff and Jones, *The Law of Restitution* (2nd Ed). In the present case, neither the plaintiff nor the defendant have made any such restitutionary claims.

Estoppel

(a) Delivery receipt

In the law of hire purchase, it is sometimes said that the hirer may be estopped from raising the issue of the non-existence of the goods, if the hirer had represented to the financier that he already had possession of the goods. If the financier acts on this representation, and to his detriment, the hirer may not subsequently be permitted to plead the non-existence of the goods as a ground to relieve him of his obligations under the hire purchase agreement. However, for estoppel to arise in such a circumstance, certain prerequisites have to be established. Again to quote Prof Guest (at para 169):

> In order for such an estoppel to arise, the statement that the goods have been delivered to him must be: (i) clear and unambiguous; (ii) intended by him to be acted upon by the owner; and (iii) believed by the owner to be true and in fact acted upon by him.

The question, therefore, in the present case is whether by signing the delivery order, the defendant is estopped from pleading that the goods were non-existent. In the discussion on delivery receipts, Prof Guest makes the following comments at p 257:

> Where a finance company is involved in the hire purchase transaction, it is normal for the hirer to be required to sign a 'delivery note' or 'delivery receipt' whereby he acknowledges that he has taken delivery of the goods let, or to be let, on hire. This document is then sent by the dealer to the finance company as proof that the goods do in fact exist and that the hirer has received them. It should not, of course, be signed by the hirer until delivery of the goods has actually been taken. But it is not unknown for hirers to sign such a note even though they have not yet received the goods. It would *seem* in such a case that a

A hirer will be estopped from denying (vis-a-vis the finance company) that the goods have been delivered to him, provided the representation is: (i) clear and unequivocal; (ii) intended by him to be acted upon by the finance company; and (iii) believed by the finance company to be true and in fact acted upon. (Emphasis added.)

B A similar view is also expressed by Prof Roy Goode, in his book, *Hire Purchase Law and Practice* (2nd Ed) at p 223:

It is *uncertain* whether a hirer who signs a receipt for goods although they have not been delivered and do not in fact exist is estopped from pleading their non-existence in an action brought against him for breach of contract by an owner acting in good faith who was induced by the hirer's receipt to believe that the C goods had in fact been delivered and to pay the dealer as a result of that belief. *It is submitted* that he would be so estopped since — unlike the case of a hirer who carelessly signs an agreement in blank — he is making a statement which to his knowledge is untrue and by which the owner is induced to act to his detriment. (Emphasis added.)

D This passage from Prof Goode's book was referred to by the Singapore Court of Appeal in *Swee Bee Trading Co Pte Ltd v Lanho Corp (Pte) Ltd.*[1] I shall revert to this judgment in greater detail later.

These authorities, therefore, appear to suggest that if certain conditions are first established, a hirer who had signed a delivery receipt, when in fact, E he had not received the goods, may be estopped from raising the non-existent of the goods as a defence in an action brought to recover the arrears.

Counsel for the plaintiff, however, was not able to refer to any decided cases where the courts have held that by the mere signing of a delivery F receipt, the hirer is estopped from pleading the non-existence of the goods. In one of the very few cases where such an issue was considered, *Lowe v Lombank Ltd*,[2] the Court of Appeal held that where a hirer had signed a delivery receipt, the hirer, on the facts of that case, was not estopped by any representation in the delivery receipt. Diplock J (as he then was) in so holding, observed, at p 618, that:

G

In order to found an estoppel on this statement in the delivery receipt, which is in a printed form drafted and supplied by them, the defendants must show: (i) that it is clear and unambiguous; (ii) that the plaintiff meant it to be acted on by the defendants or, at any rate, so conducted herself that a reasonable man in the position of the defendants would take the representation to be true and believe H that it was meant that he should act on it (see *Citizens' Bank of Louisiana v First National Bank of New Orleans* (1873) LR 6 HL at p 361); (iii) that the defendants in fact believed it to be true and were induced by such belief to act on it.

In that case, the Court of Appeal held that the alleged estoppel failed to satisfy any of the requirements spelt out by Diplock J. *First*, it was held that I the statement was not clear and unambiguous; *secondly*, the hirer had not conducted herself in such a manner that a reasonable man would believe that it was meant that he should act on the representation as contained in

the delivery receipt; and *thirdly*, the financier had failed to establish that they, in fact, signed the hire purchase agreement based on the truth of the hirer's representation.

I am also of the view that the mere fact that the hirer had signed the delivery receipt, with no intention on his part whatsoever to make any representation to the financier, and with no evidence that the financier acted upon the representation, is insufficient to raise an estoppel against the hirer.

In so holding, I am not saying that the signing of the delivery receipt in every case has no legal consequences whatsoever. The fact of signing the delivery note may, in some circumstances, be a relevant factor to be considered. In each case, the totality of the evidence has to be considered to determine whether the hirer had made any such representation so as to give rise to an estoppel. However, the signing of the delivery receipt alone, certainly cannot form the whole basis for raising estoppel against the hirer.

It should perhaps be pointed out that, it is not uncommon for hirers to be required to sign a delivery receipt and the blank hire purchase forms at the time when an order is made with a dealer. In fact, in many cases, like the present, the dealer demands the hirer to do so, for without the delivery receipt, the financier would not release the payment to the dealer. As such a practice is also well known to the financiers (not only in Malaysia, but also in England), financiers should be more prudent in ensuring that the hirer has, in fact, received the goods. After all, it is the duty of the financier to deliver the goods as so specified in the hire purchase agreement. I may also observe that in the present case, the so-called delivery receipt is not even in a proper form. It is obvious that it is in a form of a informal note prepared by the dealer and which the defendant was merely asked to sign. It appears to lack the authenticity which delivery receipts should bear.

The plaintiff has also admitted that it was a standard practice for it to have one of its own representatives to inspect the goods when they had been delivered to the hirer before any payment is made to the dealer. In this case, the plaintiff, through its own omission had failed to do so. The plaintiff, therefore, cannot now attempt to blame the defendant for its omission. In *Yeoman Credit v Apps*,[3] Harman LJ made the following observation at p 291:

> If a finance company chooses to hire goods of which it has never seen the condition, nor decided the value, in reliance of the good faith of the dealer, it cannot complain if, there being a default on his part, it is called on to be answerable for it.

In that case, the finance company had sued the hirer for arrears of instalments due under a hire purchase agreement for the hire of a car. The hire purchase agreement was negotiated by a dealer. The car which was the subject matter of the hire purchase agreement was not safe or roadworthy. Though the finance company had not seen the condition of the car earlier, it was held that as the hire purchase agreement was between the finance company and the hirer, the finance company was in breach of a fundamental condition of the agreement, in not providing the hirer with a safe and roadworthy car. See also *Karsales (Harrow) Ltd v Wallis*.[4]

Even if I am wrong in holding that the mere signing of the delivery receipt by the hirer cannot give rise to an estoppel against him, on the facts of the present case, the plaintiff has failed to establish that the plaintiff had acted on the representation to its detriment. By the plaintiff's own admission, it is clear in the present case that the payment to the dealer was not contingent only on the delivery receipt being signed by the hirer. The terms of payment to the dealer were governed by the master recourse agreement, particularly, cl 6 of the agreement. Mr Francis Chan, the plaintiff's main witness said in evidence that in this case there was no strict compliance with the master recourse agreement. This fact is also conceded by the plaintiff's counsel, who in his written submission states as follows:

> It may be that plaintiff did not strictly comply with the dealer's master and recourse agreement. As explained by the plaintiff, it was the industry practice at the material time that strict compliance is not necessary. ... It is submitted that plaintiff had in fact waived strict compliance with the dealer's master and recourse agreement ... After all, defendant was a regular customer of the plaintiff who had numerous transactions with the plaintiff and who had never defaulted in any of them save for the present transaction.

In fact, it is quite obvious that as the parties were known to one another through their earlier business deals, the entire transaction in the present case was not in strict adherence with the contractual provisions, nor for that matter, with the law. The plaintiff, therefore, cannot now be heard to complain. Their own laxity in adhering to the strict provisions of the terms of the contract in this entire transaction, has been the cause of much of the problems.

I now move on to consider whether there are any other factors which, together with the signing of the delivery receipt, may prevent the defendant from pleading the non-existence of the goods, particularly the effect of the payment of instalments by the defendant.

(b) Payment of instalments

The plaintiff contends that by paying the 14 instalments (which is denied by the defendant), the defendant is also estopped. In this regard, the plaintiff once again relies on the Singapore Court of Appeal decision in *Swee Bee Trading*,[1] referred to above, in support of their contention that estoppel is also applicable against the defendant in the present case.

Before considering the facts of the instant case, it may be relevant to once again restate the conditions for the application of estoppel by representation. These requirements have been spelt out in many cases, but I choose to rely on the law as stated by Browns LJ in the case of *Moorgate Mercantile v Twitchings*,[5] a case also dealing with the application of estoppel in a hire purchase agreement. His Lordship said at p 326:

> ... I think the elements of estoppel by representation can be stated as follows: A person seeking to rely on an estoppel by representation must prove: (i) that a representation was made to him by or on behalf of the person against whom he seeks to rely on the estoppel; (ii) that it was the intention of the person making the representation that the person to whom the representation was made should

act on it as correct; (iii) that the person to whom it was made did act on it; (iv) that the representation was not correct and that as a result of acting on it he suffered detriment.

(The decision of the Court of Appeal was reversed by the House of Lords, on different grounds. As to estoppel by representation generally, see 16 *Halsbury's Law of England* (4th Ed) at paras 1591–1604).

For the plaintiff to succeed, it must therefore establish that the defendant by making the instalment payments was representing to the plaintiff that the goods were in existence, and that the defendant in so doing intended the plaintiff to act on that representation as correct. The plaintiff has also to show that the plaintiff acted on this representation, and as a consequence the plaintiff suffered detriment.

Much of the trial was occupied with the plaintiff attempting to adduce evidence to establish that the defendant did pay the said instalments. No evidence, however, was adduced to establish that by so paying the instalments, the defendant was making a representation which was relied upon by the plaintiff to his detriment. Such evidence is crucial as the mere making of any representation (if any), without the plaintiff relying upon it to its detriment, is insufficient to establish estoppel against the defendant. How precisely did the plaintiff act on the representation, and what was the detriment?

Representation

In the present case, I am of the view that, without I having to make a finding as on whether the defendant actually paid any or all of the 14 instalments, the plaintiff has failed to show how by the payment of the instalments, the defendant had intended to make any representation to the plaintiff; and even if there was such a representation, how the plaintiff had acted on the representation to its detriment. The defendant, as hirer, may well have paid the instalments in the believe that the machines would be delivered to him shortly. There is no evidence in the present case, unlike that in *Swee Bee*'s case,[1] that by the defendant making these payments, he had represented to the plaintiff the existence of a fact.

Furthermore, the payment by the financier to the dealer, as stated earlier, was not contingent on the hirer paying the instalments, nor was it such that the financier was to pay the dealer only after the hirer had paid some of the instalments. Again as stated earlier, the agreement between the plaintiff and the dealer was governed by the master recourse agreement. Under this agreement, the dealer was entitled to be paid by the plaintiff as soon as all the formalities between the hirer (the defendant) and the dealer had been completed: see cl 6 of the master recourse agreement. Nowhere in the said agreement does it provide that the plaintiff is only obliged to pay the dealer on the receipt of the monthly instalments by the hirer. Therefore, it cannot be said by the plaintiff that relying on the payment of the instalments by the defendant, the plaintiff made the payment to the dealer, and thus acted to its detriment.

Detriment

I should also add that for the plaintiff to successfully raise estoppel, it has also to establish that the plaintiff had acted to his detriment as a result of the representation. As pointed out in 16 *Halsbury's Law of England* (4th Ed) at para 1601, the position of the law is as follows: 'A representation made to a person *after* he has altered his position cannot give rise to an estoppel, although if made earlier, and acted on, it might have done so.' (Emphasis added.)

The plaintiff has not even alleged that payment to the dealer was made as a consequence of the defendant paying the instalment.

It should further be pointed out that like in any other master recourse agreement, the dealer in the present case had also agreed to indemnify the plaintiff in the event of any claim being made against the plaintiff. The agreement, therefore, envisages a situation where the financier is well covered in cases where it is sued by the hirer. Under the master recourse agreement, therefore, the usual course of action to be taken by the plaintiff would have been against the dealer and not the hirer. In the present case, however, the plaintiff is unable to sue the dealer for breach of the master recourse agreement, as the dealer's company has been liquidated. What, therefore, the plaintiff is attempting to do in the present case, is to sue the hirer, who has already suffered a loss in not receiving the goods, for the balance of the instalments under the hire purchase agreement. It is indeed odd that the defendant has not sued the plaintiff nor has counterclaimed for moneys already paid under an agreement which was void for being in total failure of consideration: see *Yeoman Credit Ltd v Apps*.[3] It is, therefore, paradoxical that instead of the plaintiff being held liable, it having already obtained several payments, it is now suing the hirer.

Delivery receipt and instalments

Even considering the defendant's combined conduct in both the signing of the delivery receipt, and the payment of the instalments, estoppel cannot be raised, as the plaintiff has failed to establish that the plaintiff acted upon either or both of these conduct of the defendant to its detriment.

The Singapore Court of Appeal decision

The plaintiff as stated earlier, rely on the Singapore Court of Appeal decision in *Swee Bee Trading Co Pte Ltd v Lanho Corp (Pte) Ltd*.[1]

In that case, the appellants, who were the assignees of the financiers, sued the respondents, as hirers, of 18 air compressors under a hire purchase agreement in respect of 19 instalments payable under the said agreement. The appellants in that case, who also acted as a dealer in the hire purchase transaction, dealt with one Daniel Lim who was the son of the owner of a sole proprietorship known as Chop Siong Lee. Chop Siong Lee were the intended suppliers of the said air compressors under this transaction. The said Daniel Lim was also the managing director of the respondents (the

hirers). The appellants wrote a letter to Chop Siong Lee offering to act as the dealer in the said transaction and to arrange the hire purchase finance. Daniel Lim signed the acceptance of the offer of the appellants on behalf of Chop Siong Lee. Daniel Lim then informed the appellants that the air compressors had arrived. After the inspection of the air compressors, it was agreed that the hire purchase agreement between the financiers and the respondents be entered into. Subsequently, the hire purchase agreement was signed again by Daniel Lim on behalf of the respondents, as hirers. Before the said agreement was signed, the delivery receipt was signed by Daniel Lim stating unequivocally that the respondents had taken delivery of the air-compressors.

The appellants, as dealers, then paid Chop Siong Lee and were reimbursed by the finance company. Before payment and reimbursement, the said hire purchase agreement and the delivery receipt signed by Daniel Lim was sent to the financiers. However, as the Court of Appeal pointed out, at this stage, the 18 air compressors were still in the possession of the Bank of America as pledgee. Chop Siong Lee, as the intended suppliers were not the legal owners of the goods, not having paid for them. Both Chop Siong Lee and the respondents through the knowledge of its managing director (Daniel Lim) knew this, and also knew that the representation by the respondents that they had taken delivery of the air compressors was false. The appellants and the finance company were, however, completely in the dark.

After the signing of the hire purchase agreement and the payment of several instalments, the respondents with the consent of the financiers, transferred the air compressors to Siong Lee Heavy Equipment Pte Ltd, a company which belonged to Daniel Lim and his brother. Under this assignment, Siong Lee agreed to pay the outstanding instalments, though under cl 3 of the assignment, the respondents remained liable under the hire purchase agreement to the financiers. Siong Lee, after making one further payment, defaulted. The financiers then obtained recourse from the appellants as dealers. The appellants paid the financiers the balance due under the hire purchase agreement and the financiers duly assigned their rights, title and interest to the appellants.

The appellants then brought a claim against the respondents, and the respondents denied liability on the ground that the air compressors were never delivered to the respondents, and as such, there was a total failure of consideration. The respondents' contention was accepted by the High Court and the appellants' claim was dismissed. The appellants then appealed to the Court of Appeal.

In the Court of Appeal, Lai Kew Chai J in a careful judgment analysed the roles played by the various parties to the said transaction, particularly that of Daniel Lim's. His Lordship then pointed out at pp 91–92:

> It cannot be too strongly emphasized that some five months after the agreement the respondents *continued to represent* to the financiers that they had in their possession the 18 air compressors in respect of which they were purporting to

A assign their rights under the agreement to Siong Lee Heavy Equipment Pte Ltd. (Emphasis added.)

Lai Kew Chai J then concluded at p 92:

> In all the circumstances, we have come to the conclusion that the respondents were indeed estopped from asserting the non-existence of the air compressors ... The respondents had made express representations both in writing and orally ... and again in writing in the course of the purported assignment ... that they had taken delivery of the compressors. The financiers had acted on the representations ... to their detriment. ... In addition, the respondents paid four instalments and caused Siong Lee to pay the fifth instalment under the agreement. It would lie ill in the mouth of the respondents to assert now that the air compressors were non-existent or that the financiers were not the owners.

His Lordship, in describing Daniel Lim as a 'villain' then added at p 92:

> ... Daniel Lim was the managing director of the respondents and it was within his ostensible authority to sign the delivery receipt and make the representations. ... This document and the subsequent conduct of the respondents, including the purported assignment ... led the financiers to believe and they must have believed that the 18 air compressors were safely in the possession of the respondents, free from any adverse claims.

The Court of Appeal also rejected the argument of the respondents that the appellants were negligent.

It is, therefore, evident that the Court of Appeal in arriving at its decision, was greatly influenced by the fraud perpetuated by Daniel Lim and also by the express representations made to the finance company by the respondents, not only by the signing of the delivery note, but also by the subsequent assignment that the goods existed. Daniel Lim having been a party to this fraud, could not subsequently plead estoppel to defeat the claim of the innocent party, the financiers, and through them, the appellants. The equity in the case did not allow the respondents to rely on estoppel.

The facts of the present case may therefore be clearly distinguished from the Singapore decision in *Swee Bee Trading*.[1] The defendant, in the instant case, as I had stated earlier, made no representation to the appellants calculated to misrepresent to the plaintiff any state of affairs as to the non-existence of the goods. From the facts, it is clear that he was innocent, unlike Daniel Lim in *Swee Bee*'s case.[1] For these reasons, *Swee Bee*'s case[1] cannot be of much assistance to the plaintiff.

Affirmation of breach

One further point I need to consider is whether the defendant, by paying the instalments had accepted the breach of the contract by the plaintiff. Can it be said that when the defendant continued paying the instalments when he was aware that the machines had not been supplied, he had accepted the breach and instead of avoiding the contract, had affirmed it. In this respect, *Yeoman Credit Ltd v Apps*[3] is clearly distinguishable. In that case, the Court of Appeal held that there was no total failure of consideration as the hirer

had been delivered the car, albeit, defective. As this point was not canvassed by the plaintiff, I need not delve into it, except to say that, whilst the defendant may have intended to maintain the contract by paying the instalments (if he did) in anticipation that the machines would be delivered to him, the payment of these instalments cannot preclude him from thereafter bringing the contract to an end. As Goff and Jones, *The Law of Restitution* (2nd Ed) point out at p 464:

> While he paid the instalments, the defendant had shown an intention to maintain the contract; but, in view of the continuing nature of the breach, his payments did not preclude him from therefore bring the contract to an end.

In any case, it is doubtful whether such principles are at all applicable to cases such as the present one where there is a total failure of consideration. The question of acceptance of the contract only arises in cases where a party seeks to recover money in pursuance of a contract under which he becomes entitled to rescind it on the ground of total failure of consideration. In other words, it is the hirer (the defendant), who has the right to recover the money paid as instalments and not the plaintiff, who has the right to affirm or rescind the contract: see 9 *Halsbury's Laws of England* (4th Ed) at para 667.

I now move on to consider the plaintiff's alternative argument, that is one based on estoppel by negligence.

Estoppel by negligence

The plaintiff, contends in the alternative that the defendant is estopped by his negligent conduct in signing the delivery receipt when in fact he had not received the goods. It is said that the defendant owed a duty of care to the plaintiff and that by signing the delivery receipt, the defendant had breached the duty of care. This point, however, was not strenuously argued by the plaintiff, except to rely on the case of *Seton v Lafone*[6] and 16 *Halsbury's Laws of England* (4th Ed) at para 1620.

The law relating to estoppel by negligence has now been reconsidered by the House of Lords in *Moorgate Mercantile Co v Twitchings*[5] (decided after the publication of 16 *Halsbury's Laws of England*). Lord Edmund-Davis pointed out at p 658 that in cases where estoppel by negligence is raised: 'The first question is: was the plaintiff [the defendant, in our present case] under any duty to the defendant to take reasonable care?'

Considering the nature of the transaction in the present case, a hire purchase agreement involving the financiers, the dealer and the hirer, it appears to me that the hirer owes the financier no such duty as that suggested by the plaintiff. The hirer, only deals with the dealer with regard to the details of the transaction. The hirer does not deal directly with the financier. It is only the dealer who does so. Therefore, if any such duty is owed at all, it is owed to the plaintiff by the dealer and not the hirer. It may be true that the defendant was careless in signing the delivery receipt. But as Lord Edmund-Davis pointed out in *Moorgate Mercantile*,[5] at p 659:

A In most situations it is better to be careful than careless, but it is quite another thing to elevate all carelessness into a tort. Liability has to be based on a legal duty not to be careless, and I can find none in this case.

But more importantly, I hold say that as the signing of the delivery receipt did not amount to any representation by the defendant to the plaintiff, for B reasons already stated, the question of estoppel by negligence does not arise in the present case. As pointed out by 16 *Halsbury's Laws of England* (4th Ed) at para 1622, '... the negligence must not only be calculated to have the misleading effect attributed to it but must be the proximate or real cause of that result'.

C It is clear from the evidence that the defendant did not sign the delivery order merely to mislead the plaintiff; nor was it the real cause of the plaintiff paying the dealer. In other words, as I have stated earlier, there is no evidence to show that the plaintiff acted on the conduct of the defendant. In *Moorgate Mercantile Co v Twitchings*,[5] the House of Lords refused to create new duties where none were contemplated.

D

Conclusion

Therefore, in considering the totality of the evidence, I am of the view that in the present case the plaintiff's action is misconceived and should be E dismissed as the plea of estoppel by representation or negligence fails in limine.

Postscript

Estoppel: shield or sword

F The question as to whether estoppel may be invoked as a cause of action or whether it is always raised as a defence was not canvassed before this court. The trial was conducted on the basis that the plaintiff in the present case could invoke the doctrine. I, therefore, need make no findings on this issue. However, as this point was alluded to by the plaintiff during the trial, I G venture to make some observations on this point of law.

As pointed out earlier, the more common situations where estoppel is raised is by way of a defence. As it is often said: estoppel cannot be used as a sword but only as a shield. For example, in the cases that have been referred to in this judgment relating to the application of estoppel in hire purchase agreements, estoppel was not pleaded by the plaintiff but by the H defendant. For example, in *Moorgate Mercantile Co*,[5] the defendant pleaded estoppel against the plaintiff on the ground that the plaintiff was estopped from asserting their title to the car against the defendant; whereas in *Lowe v Lombank*,[2] estoppel was pleaded against the plaintiff, the hirer, when she brought an action against the bank, on the ground that she had signed a I delivery receipt stating that the car was in good order and condition.

Therefore, if, in the present case, it was the hirer who brought an action against the plaintiff, the plaintiff may well plead estoppel against the hirer,

on the ground that the hirer had signed the delivery order and had made payments towards the instalments. However, that is not the case.

The plaintiff in the present case, however, rely on the Singapore Court of Appeal decision in *Swee Bee Trading*[1] to support its contention that estoppel is applicable in this case. It further contends that as the cause of action is not based on estoppel but on a breach of the hire purchase agreement, it is not using estoppel as a sword. It is merely, it is said, relying on estoppel against the defendant to succeed in its cause of action.

In this regard, to support their submission, the plaintiff rely on the following observations of Brandon LJ in *Amalgamated Investment & Property Co v Texas Commerce International Bank*[7] at p 591:

> ... while a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed.

However, on a close reading of the decision of the Court of Appeal in *Amalgamated Investment*,[7] it is clear that the type of estoppel which Brandon LJ was referring to, was not estoppel by representation, as in the present case, but rather on estoppel by convention. In fact, at p 591, his Lordship clearly drew the distinction between the two types of estoppel:

> The kind of estoppel which is relevant in this case is not the usual kind of estoppel in pais based on a representation made by A to B and acted on by B to his detriment. It is rather the kind of estoppel which is described in Spencer Bower and Turner on *Estoppel by Representation* (3rd Ed, 1977) at pp 157–160 as estoppel by convention.

Lord Denning MR, the foremost proponent of the doctrine of estoppel clarified the situation in that case, at p 584, as follows:

> When the parties to a contract are both under a common mistake as to the meaning or effect of it and thereafter embark on a course of dealing on the footing of that mistake, thereby replacing the original terms of the contract by a conventional basis on which they both conduct their affairs, then the original contract is replaced by the conventional basis. The parties are bound by the conventional basis. Either party can sue or be sued upon it just as if it had been expressly agreed between them.

In conclusion, Lord Denning MR added at p 584:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases ... It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence; estoppel cannot give rise to a cause of action; estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of

A them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

The question of estoppel by convention, as in *Amalgamated Investment & Property*,[7] is not applicable in the present case, as mistake was not relied B upon by the parties.

But, be that as it may, the decision of the High Court of Australia in 1988 has now added a new dimension to the issue as to whether estoppel can be used as only a shield and not as a sword. The High Court of Australia in the case of *Walton Stores (Interstate) Ltd v Maher*,[8] provides a broader view of the application of estoppel by the plaintiffs.

C In that case, the action was brought by the landlord against the tenant who had agreed that they would lease the property from the landlord after it had been demolished and replaced by new premises. The High Court in holding that promissory estoppel was applicable, held that the appellant (the defendant) was estopped from denying that a concluded contract by D way of exchange did exist between the parties. The estoppel issue was raised by the plaintiff against the defendant. The court in holding that a plaintiff may rely on estoppel, observed that there was no reason as to why the doctrine of estoppel ought to be constricted.

The case itself dealt with promissory estoppel. However, as the decision of the High Court illuminates this area of the law which otherwise is in E doubt, I quote the following observations of the court in extenso. Mason CJ and Wilson J in a joint judgment observed at p 114:

> There has been for many years a reluctance to allow promissory estoppel to become the vehicle for the positive enforcement of a representation by a party that he would do something in the future. Promissory estoppel, it has been said, F is a defensive equity and the traditional notion has been that estoppel could only be relied upon defensively as a shield and not as a sword. ... *High Trees* [1947] KB 130 itself was an instance of the defensive use of promissory estoppel. *But this does not mean that a plaintiff cannot rely on an estoppel.* Even according to traditional orthodoxy, a plaintiff may rely on an estoppel if he has an independent cause of action, where in the words of Denning LJ, the estoppel 'may be part of G a cause of action, but not a cause of action in itself'. (Emphasis added.)

Brennan J observed as follows at p 121:

> It has been said that estoppel in pais is merely a rule of evidence and not a cause of action but that proposition needs some explanation. If the estoppel relates to the existence of a contract between the parties, the legal relationship between the H parties is ascertained by reference to the terms of the contract which has been assumed to exist. If, in the assumed state of affairs, the contract confers a cause of action on the party raising the estoppel, the cause of action may be enforced. The source of legal obligation in that event is the assumed contract; the estoppel is not a source of legal obligation except in the sense that the estoppel compels the party bound to adhere to the assumption that the contract exists.

I His Lordship continued at p 126: 'Why should an equity of the kind to which *Combe v Combe* [1951] 2 KB 215 refers be regarded as a shield but not a sword?'

Deane J who delivered a separate judgment observed at p 134: A

> It has often been said that estoppel can be used only as a shield and not as a sword. In so far as estoppel by conduct is concerned, that statement is generally true only in the very limited sense that such an estoppel operates negatively to preclude the denial of, or a departure from, the assumed or promised state of affairs and does not of itself constitute an independent cause of action. The B authoritative expositions of the doctrine of estoppel by conduct (or, in more obscure language, in pais) to be found in judgments in this court have been consistently framed in general terms and lend *no support for a constriction of the doctrine in a way which would preclude a plaintiff from relying upon* the assumed or represented mistaken state of affairs (which a defendant is estopped from denying) *as the factual foundation of a cause of action* arising under ordinary principles of the C law. There is no basis in principle for such a constriction of the doctrine. In so far as decisions or *statements in judgments in cases in other courts would support a contrary view, they should not be accepted in this country.* (Emphasis added.)

As I have stated earlier, I do not find it necessary to express any view as to the position of the law in Malaysia. It would have to wait until an opportunity arises for a court, after hearing full arguments on the issue, to express its D views.

Claim dismissed.

Reported by Premala Pathmanathan

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